

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

DAVID DAVIS,)	
)	
Plaintiff,)	
)	
v.)	CIVIL ACTION NO. 3:06cv544-WHA
)	
PHENIX CITY, ALABAMA, et al.,)	
)	
Defendants.)	

ORDER

This cause is before the court on Defendants H.H. Roberts and Wallace Hunter's Motion for Leave to Amend Answer Pleading the Affirmative Defense of Qualified Immunity (Doc. #72), which was filed on August 6, 2007, two weeks before the trial date of this case.

The deadline for amendment of pleadings in this case was November 13, 2006, and the Defendants have not shown cause for the failure to raise the affirmative defense of qualified immunity. Had this defense been raised in the Answer, the court could have received briefing on the legal issues involved and ruled on the defense even before discovery had taken place. This court would, therefore, not ordinarily be inclined to allow the Defendants to amend the Pretrial Order, which takes the place of the pleadings, at this stage in the proceedings.

In opposition to the Defendants' motion, the Plaintiff has argued that there is no Eleventh Circuit holding that requires this court to allow the Defendants to amend their pleadings to assert the affirmative defense. The Eleventh Circuit has recognized, however, that defendants can raise the defense of qualified immunity for the first time at trial. *See Skritch v. Thornton*, 280 F.3d 1295, 1306 (11th Cir. 2002). This is a view which has been expressed by the Circuit, albeit in an unpublished opinion, as recently as 2006. *See Fry v. Hillsborough County School Bd., Fla.*, 190

Fed. Appx. 810, 2006 WL 2034967 (11th Cir. July 20, 2006). The Circuit has indicated, therefore, that in the absence of evidence of abusive delay, qualified immunity is not waived even if not raised before trial. This court is of the opinion that the Circuit would so hold if directly presented with the question.

Although the court does not find abusive delay on the part of the Defendants in this case, the court is concerned with the prejudice that the late assertion of this affirmative defense may have on the Plaintiff, particularly given the Plaintiff's counsel's representation that the focus of discovery would have been different had the defense been raised earlier. The court, therefore, will allow the Plaintiff to seek a continuance of the trial and reopen discovery should the Plaintiff choose to do so.

Accordingly, it is hereby ORDERED that the Motion for Leave to Amend is GRANTED, to the extent that the Order on Pretrial Hearing (Doc. #55) is hereby Amended to add to "4(b) The defendants:" the following: "The Defendants H.H. Roberts and Wallace Hunter each plead the defense of qualified immunity." The Plaintiff shall file a Motion for Continuance on or before August 9, 2007 if he wishes this cause to be continued. If continued, the case will be set on the March 3, 2008 term of court and the court will set a date for filing an Amended Report of Parties Planning meeting with any requested deadline changes.

DONE this 7th day of August, 2007.

/s/ W. Harold Albritton
W. HAROLD ALBRITTON
SENIOR UNITED STATES DISTRICT JUDGE